IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 682 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAIJIBHAI SURABHAI SOLANKI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 682 of 1996

MS SADHANA SAGAR for Petitioner No. 1

MS NANDINI JOSHI, APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 19/07/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. This appeal has been filed by the original accused of Sessions Case No. 773 of 1994 of Sessions Court, Kheda at Nadiad. The appellant was tried for the alleged commission of offences made punishable under Sections 302 and 447 of the Indian Penal Code (for short 'IPC').

1.1. The case of the prosecution in nutshell can be stated as under :-

On 21st June, 1994 the appellant had gone to the field of deceased Girishbhai Chhotabhai Patel bearing survey block no. 186 of village Gada in Petlad Taluka, district Kheda. He was summoned by the deceased to pluck bringals from the field. However, it appears that the appellant had not reached in time and had reported late for work. The deceased, therefore, scolded him and turned him away. Hence the appellant got enraged and he went home and at about 8.45 a.m. he returned to the field of the deceased armed with Dhariya. On reaching the field he assaulted the deceased with Dhariya and caused him 5 to 6 injuries on the neck. As a result of the assault, Girishbhai collapsed on the ground and died almost instantaneously. Prosecution witness Jashbhai Shanabhai, who was present at the place, tried to save Girishbhai by holding out a stick (Parona) to ward-off the blows. However, Jashbhai did not succeed in averting the assault on deceased and as stated above, the deceased received fatal injuries. After finishing the act the appellant ran away from the place. The witness Jashbhai, while the assault was going on, raised shouts and one Ambalal Budhabhai, who was working in his field at that time, saw in that direction and he was able to witness the incident. Both these persons, namely Jashbhai and Ambalal had a close look at the distance and they found that Girishbhai had received injuries on the right cheek and right side of the neck and also on the right shoulder and he was profusely bleeding from those injuries. Upon examining he was found dead.

1.2. Ambalal Budhabhai thereafter went towards the village to inform others about the incident. One Ambalal Kashibhai Patel, son of the uncle of the deceased, around 9.00 a.m. was on his way to his field situated in the outskirts of village Gada. Ambalal Budhabhai went running to him and told him that the appellant had delivered 5 to 6 blows with Dhariya to the deceased and he had killed him. He further informed him that the

incident happened while Girishbhai i.e. deceased was in his field and he (Ambalal Budhabhai) and Jashbhai Kalabhai were ploughing their fields with the aid of their bullocks. Ambalal further told the informant that since Girishbhai had driven away the appellant from the field as he had reached late, the appellant had gone home and had brought Dhariya with him and after returning to the field of the deceased, from the back side of the deceased he had delivered Dhariya blows on the deceased. He further told the informant that Jashbhai had tried to intervene by holding out his stick but it was of no use and the appellant had managed to deliver repeated blows on the deceased though 2 to 3 blows had landed on the stick.

1.3. On receiving this information informant Ambalal Kashibhai went to the field and thereafter in the company of Ambalal Budhabhai, Naynaben - wife of Girishbhai, Bhupendrabhai Manilal and one Bhupendrabhai Motilal went to the police station to lodge complaint against the appellant. The complaint was lodged on the same day around 10.00 O'clock in the morning. On receipt of the complaint, the police of Sojitra Police Station registered offence against the appellant and commenced usual investigation. In the course of the investigation the appellant was arrested on the same day, panchnama of scene of offence, the inquest panchnama, panchnamas with regard to seizure of the clothes put on by the deceased, the blood stained earth, etc. were drawn. While drawing the panchnama of the person of the accused/appellant, it was noticed that he had received some injuries. He was later on referred to the hospital for medical examination and treatment and the Medical Officer on duty had found that he had suffered some injuries on the feet, over the back and the lateral aspect of left thigh. The Investigating Officer also seized the offending weapon, viz. Dhariya under discovery panchnama and found that it was stained with blood. He, therefore, sent the weapon alongwith other articles, namely, the clothes put on by the deceased, the blood stained earth, a broken tooth recovered from the place of incident, etc. to the Forensic Science Laboratory for chemical examination and upon receiving the report, included it in the record of the investigation. Upon completion of the investigation, he submitted charge-sheet in the concerned Court of learned Judicial Magistrate, who in turn committed the case to the Court of Sessions as the offence u/S. 302 of the IPC is exclusively triable by the Court of Sessions.

2. At the trial, the learned Addl. Sessions Judge, Kheda at Nadiad, framed charge at Exh. 2 against the

appellant on 5th April, 1995 for offences under Sections 302 and 447 of the IPC and also for offence under Section 135 of the Bombay Police Act. The appellant pleaded not guilty to the charge and claimed to be tried.

2.1. In support of its case, the prosecution examined the following witnesses :-

i. P.W. 1 - Kiritbhai Chhatabhai Exh.6
ii. P.W. 2 - Ambalal Kashibhai Exh. 8
iii. P.W. 3 - Ambalal Budhabhai Exh. 10
iv. P.W. 4 - Jashbhai Shanabhai, Exh.11
v. P.W. 5 - Bhupendrabhai Motibhai, Exh.13
vi. P.W. 6 - Arvindbhai Javerbhai Exh. 19
vii. P.W.10 - Vindobhai Dhanjibhai Kharadi, Exh. 35
viii. P.W.11 - Dr. Mansurali Shalehbhai Hirani, Exh.43.

It also produced documentary evidence in the form of the First Information Report, various panchnamas, the post mortem notes, report of the Forensic Science Laboratory, etc. On conclusion of recording of the oral evidence of the prosecution, further statement of the appellant was recorded u/S. 313 of the Code of Criminal Procedure to enable him to render explanation with regard to the incriminating circumstances appearing in the evidence of the prosecution witnesses. From the oral statement of the appellant recorded u/S. 313 of the Code of Criminal Procedure, it appears that no specific defence was raised by him and the defence appear to be that of general denial. However, he has not only submitted his written statement at Exh. 49 but also examined his defence witness, namely, Dr. Ashok Misharilal, Medical Officer of Petlad Hospital.

3. At the end of the trial, the learned Judge came to the conclusion that the appellant had committed offence punishable u/S. 302 of the IPC and he, therefore, sentenced him to suffer RI for life and to pay a fine of Rs.1,000/-. He also found him guilty for committing offence u/S. 447 of the IPC as well as u/S. 135 of the Bombay Police Act and convicted the appellant for the same, but no separate sentence was awarded for these offences. It is this judgment and orders of conviction and sentence which are in challenge in this appeal.

4. We have heard Ms. Sadhna Sagar, learned advocate for the appellant and Ms. Nandini Joshi, Ld. APP for the respondent - State. Ms. Sagar has submitted that the judgment and orders of conviction and sentence passed by the trial Court are erroneous in as much as the

prosecution had failed to prove its case beyond reasonable doubt. She has further submitted that the so called eye witnesses, namely, Prosecution Witnesses Nos. 3 and 4 were merely chance witnesses and their evidence cannot be relied on. She has further submitted that Prosecution Witness no. 3 - Ambalal Budhabhai was standing at the distance of 500 ft. from the place of incident and it is on record that in-between the place where he was standing and the scene of incident, there were trees and also hedge, which would have obstructed his view and he could not possibly have seen the incident. She has further submitted that considering the fact that the appellant had received injuries, it is quite possible that he was assaulted first and thereafter the present incident had taken place. She, therefore, submitted in the alternative that at the most it would be a case u/S. 304 Part-I or Part-II of the IPC, but not u/S. 302 of the IPC.

4.1. As against that, Ms. Nandini Joshi, Ld. APP has submitted that considering the evidence on record, it is very clear that the prosecution has established the guilt of the appellant beyond reasonable doubt and the conviction recorded by the learned trial Judge u/S. 302 of the IPC is just and proper. She has further submitted that the injuries found on the appellant, in the opinion of the doctor examined by him as defence witness, were atleast two days old and considering the fact that he was examined by the doctor on the day on which the incident took place, it is obvious that these injuries were not caused at the time of incident and, therefore, there was no question of either exercising right of private defence or exceeding the same. Therefore, there was no question of the appellant committing an offence u/S. 304 Part-I of the IPC. She has lastly submitted that this appeal has no merits and it requires to be dismissed.

5. We have carefully perused the entire record and proceedings of this case and have carefully reappreciated the evidence adduced by the prosecution as well as the defence in support of their respective cases.

6. We may first turn our attention to the issue whether the deceased had died homicidal death. To establish this fact the prosecution has examined P.W. 11 - Dr. Mansurali Shalehbhai Hirani, Exh. 43. This witness has performed the post mortem examination of deceased Girishbhai. He has also produced the report of post mortem examination on record, which is at Exh. 45. According to this witness the deceased had suffered the following injuries. These injuries have been indicated in

column no. 17 of the post mortem report. They are as under :-

(1) CLW 8" x 4" on Rt. side upper neck from Rt. side and thyroid regun to back of neck muscle deep (around 4" deep)
(2) CLW 1" x 1" M.D. as Rt. deltoid region in two in number
(3) CLW 4" x 2" M.das about 1/2 shoulder part.
(3) CLW 1" x 1/2" M.D. on Rt. lower lip extended to Rt. cheek.
(4) CLW 1/2 x 1/2 on chin out two in nud M.D. about 1/2 palm
(5) CLW 1/2 x 1/4 B.D. on lt. little finger middle palm
(6) CLW 1" x 1/2" M.D. on Lt. side region of neck.

He has further stated that these injuries were antemortem. According to him, these injuries could be caused by a weapon like Dhariya as all these injuries were cut wounds. In his opinion these injuries were sufficient in ordinary course of nature to cause death. So far the cause of death is concerned, it has been mentioned in the post mortem notes that it was due to shock due to multiple injury to body which resulted in muscular external haemmorhage and cardia respiratory failure. In the cross-examination by the defence it was tried to suggest to the witness that since the injuries have been described as contused lacerated wound, it could not have been caused by the Muddamal article no. 3 Dhariya. However, this witness has tried to explain the meaning of "CLW" as "Cut & Lacerated Wound" and not "Contused Lacerated Wound". Though the defence has tried to cross-examine the witness in detail on this aspect, it transpires that the injuries suffered by the deceased were caused by a weapon like Muddamal Article Dhariya and there was no question of injuries being caused by any hard and blunt substance as tried to be suggested by the defence. Considering this evidence, it becomes clear that the deceased had died a homicidal death and we are, therefore, in agreement with the findings given by the trial Court on this count.

7. So far the actual incident is concerned, the prosecution has placed reliance on two eye witnesses, namely, P.W. 3 - Ambalal Budhabhai and P.W. 4 - Jashbhai Shanabhai at Exhs. 10 and 11 respectively.

7.1. P.W. 3 - Ambalal Budhabhai has stated that he was also known as Ambubhai and that he knew deceased Girishbhai Chhotabhai. According to him, the incident

had taken place at about one and half years back. On the day of incident he was cutting the hedge in the field of the deceased. He had been to the field at about 7.00 a.m. and at that time the deceased as well as P.W. 4 Jashbhai were also there. At about 8.00 O'clock in the morning the appellant came there, but he was asked to go away as he had reported late for the work of plucking bringals. Thereafter, at about 8.45 a.m. he returned with Dhariya and gave a blow with Dhariya on the neck of the deceased. The witness further states tat on receiving the blow Girishbhai fell down and thereafter the appellant gave 3 to 4 more blows to Girishbhai. He has further stated that P.W. Jashbhai tried to save Girishbhai by obstructing the blow of Dhariya with his stick, but he could not succeed in saving him. After completing the assault, the appellant ran away from the place. The witness has identified the appellant in the Court room at the time of giving evidence before the trial Court. In the cross-examination he has stated that his field is situated adjoining to the field of deceased. He has further stated that much prior to the present incident he was doing agricultural work in the field of Girishbhai. But at the time when the incident took place he was not working for Girishbhai. He has further stated that the labourers should reach the field around 7.30 a.m. On that day he was also called for labour work by Girishbhai. He has denied the suggestion that there was no bringal crop standing in the field of the deceased. He has further stated that he did not remember whether in the surrounding fields the farmers were working. According to him, at the time when the incident took place he was cutting the hedge which is at a distance of about 400 to 500 ft. from the place where the incident took place. He has further stated that between these two places, there are trees and hedge also. According to him, he had reached the spot on hearing the shouts and when he reached there he found that Girishbhai was lying on the ground and people had gathered there. According to this witness, he has informed about the incident to Ghanshyambhai and Bhupendrabhai Manibhai. He has stated in the cross-examination that the appellant had delivered blows only on the neck of deceased Girishbhai. He has also denied the suggestion that he was not present when the incident took place.

7.2. Second eye witness is P.W. 4 - Jashbhai Shanabhai. According to him, he was present in the field of Girishbhai when the incident took place. He has stated that the appellant was called by Girishbhai for plucking the brinjals from the field, but as he came late Girishbhai asked him to go away. The appellant,

therefore, left the place in anger and returned some time thereafter with a Dhariya. According to the witness at that time he was ploughing the field and the deceased was standing by his side. He has also stated that P.W. Ambalal Budhabhai was cutting the hedge. He has further stated that when the appellant came there, he all of a sudden started giving blows with Dhariya on the neck of the deceased. He tried to save him by holding out his stick to obstruct the Dhariya blow, but he did not succeed and the deceased had received serious injuries on his neck resulting into almost instantaneous death. After completing the assault the appellant ran away from the place. In the cross-examination by the defence it has been suggested to him by the defence that his (witness's) sister-in-law (Sali) had married to the appellant by performing Fool Har ceremony, which was not liked by the present witness. The defence has further tried to cross-examine him that while Girishbhai was assaulted he was ploughing the field and he could not have intervened. However, in the earlier part of the cross-examination he has stated that he was standing near the deceased when the assault on him took place and he tried to save him by holding out the stick with a view to obstruct the blows delivered by the appellant, but he could not succeed in saving the deceased. The stick had received three cuts on account of the Dhariya blows landed on it. He has denied suggestion that he was not present when the incident took place and that he is giving evidence to oblige the prosecution.

7.3. P.W. 2 is Ambabhai Kashibhai, Exh. 8 is the cousin of the deceased and he was informed by Ambalal Budhabhai about the incident. He, therefore, initially went to the field and from there he went to the police station to lodge complaint. He has further stated that he had given the complaint on the basis of the information given to him by witness Ambabhai Budhabhai. In the cross-examination nothing much has been brought out by the defence.

7.4. P.W. 1 - Kiritbhai Chhotabhai Exh. 6 has been examined to show that the field in which incident took place belonged to the deceased Girishbhai and that at the relevant time there was crop of bringal standing in it.

7.5. The next witness is P.W. 5 - Bhupendrabhai Motibhai Exh. 14, who has acted as a panch for inquest panchnama as also the panchnama for the scene of offence.

7.6. The prosecution has examined other panchas, namely P.W. 6 - Arvindbhai Javerbhai in whose presence

the offending weapon was seized.

7.7. Investigating Officer, namely P.W. 10 Vinodbhai Dhanjibhai Kharadi, has in the evidence before the Court narrated the course of investigation. In the cross-examination nothing much of help from the point of view of the defence has been elicited from this witness.

7.8. Apart from this, the prosecution has also placed reliance on documentary evidence such as panchnama, FIR, post mortem notes, etc.

8. Having carefully examined the evidence of these witnesses, there is no hesitation on our part to hold that it was the appellant who had assaulted the deceased on the day of incident with Dhariya and had caused him fatal injuries. This fact has been seen by two witnesses, namely Ambabhai Budhabhai and Jashbhai Shanabhai. Their presence at the field at the time when the incident took place appears to be very natural. It is, therefore, difficult to discard their evidence on the ground that both of them are chance witnesses. Further that Jashbhai even tried to rescue deceased Girishbhai by trying to obstruct the blows of Dhariya on the deceased by means of a stick. He, however, could not succeed. Further the second eye witness Ambubhai Budhabhai after the incident was over, immediately rushed towards the village and just on the outskirts of the village he found Ambalal Kashibhai, who is closely related to the deceased and apprised him of what had happened in the field. On the basis of the information given by Ambalal Budhabhai complaint has been filed by Ambabhai Kashibhai wherein name of the appellant is disclosed; not only that but part played by him is also adequately narrated. The FIR corroborates what these witnesses state. It may also be noted here that a complaint before the police has been lodged within a short time. We have, therefore, no reason to discard the evidence of these two eye witnesses.

8.1. So far their oral evidence is concerned, it stands amply corroborated by the medical evidence. There is medical evidence on record to show that the deceased had died as a result of injuries caused to him by means of a Dhariya. The medical evidence, therefore, lends full support to the say of these two eye witnesses.

9. The question that remains to be decided is that when the appellant is proved to have assaulted the deceased, whether his act would fall within the four corners of Section 300 of the IPC or it is covered under

one of the exceptions to the said section. It appears that the appellant had received some injuries on the back, though in the opinion of the doctor, they were two days' old injuries. It was merely a probability expressed by the doctor. There is ample evidence on record to show that on the day of incident, since the appellant reached little late for plucking the bringals, he was scolded by the deceased and not only that but he was asked to go away. That had enraged the appellant to a considerable extent as there is evidence to show that he was murmuring in anger. It is, therefore, quite possible that the appellant must have been condemned by the deceased and even some physical beating might have been done by him and as a result of that he might have picked up a Dhariya and given 2 to 3 blows to him causing his instantaneous death. Though the prosecution has tried to suggest that the appellant went home and thereafter returned to field again with Dhariya. However, on this aspect, there is no satisfactory evidence available as different versions have come on record. It is, therefore, quite possible that in a fit of anger the appellant might have picked up Dhariya from the field itself upon being assaulted by the deceased and upon losing his self control and he might have caused the deceased several injuries. It, therefore, cannot be said that the appellant had committed offence u/S. 302 of the IPC. The possibility of causing injuries to the deceased in a grave and sudden provocation cannot be ruled out. In that view of the matter, the offence that has been committed by the appellant could be said to be one u/S. 304 Part-I and not u/S. 302 of the IPC. If that be so, the conviction recorded by the trial Court for offence u/S. 302 is erroneous and it deserves to be altered to one u/S. 304 Part-I of the IPC. So far he conviction recorded by the trial Court for offence u/S. 447 of the IPC and u/S. 135 of the Bombay Police Act is concerned, we find no error having been committed by the trial Court and we, therefore, confirm the same. Considering the fact that in our opinion the offence committed by the appellant is u/S. 304 Part-I of the IPC, the sentence imposed by the trial Court of RI for life is also required to be quashed and instead we impose the sentence of RI for 10 years maintaining the sentence of fine as it is, the appeal is required to be partly allowed.

In the result, the appeal is partly allowed. Conviction of the appellant u/S. 302 of the IPC is altered to one u/S. 304 Part-I and instead punishment of RI for life awarded by the trial Court, appellant is now sentenced to suffer RI for 10 years. The sentence of fine will remain as it is.

Muddamal articles to be disposed of in terms of the judgment of the trial Court.

[B.J. SHETHNA, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.